SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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In the ordinary case a complete answer to a petition such as this would be the oft applied policy of the Court against according an additional hearing merely on the tendencies of the evidence where no important question of law is involved.

Attention to this policy was called by Mr. Justice Roberts, Chief Justice Stone and Mr. Justice Frankfurter concurring, in his dissent in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1080, 63 S. Ct. 1062. On page 1066 he said.

> "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed. The instant case plainly belongs in the class last mentioned. All members of the Supreme Court of Vermont agreed upon the controlling legal rule. They sharply and almost evenly divided on the question whether the plaintiff's evidence brought her case within that rule. What they decided, and what we decide, can add nothing to the body of jurisprudence."

That is precisely the situation in the case at bar. There is no difference between the Supreme Court of the United States and the Supreme Court of Utah or between the majority and minority of the Utah Court as to the controlling legal principles in the case at bar. If this Court grants certiorari to review this case nothing will be added to the body of jurisprudence respecting Federal Employers' Liability Act cases. There will only be an examination and decision by a third court as to the evidence and its tendencies.

The Supreme Court of Utah has manifested a sincere, conscientious and intelligent disposition to apply the Federal Employers' Liability Act strictly in accordance with the applicable decisions of the Supreme Court of the United States.

Petitioner makes the wholly unwarranted charge that the Supreme Court of Utah, follows a policy "of frustrating the operation of a Federal statute and ignoring and refusing to follow the decisions of the United States Supreme Court—." See p. 5. The actions of counsel for the petitioner belie this charge, else why do they select Utah as the forum in which they institute F. E. L. A cases arising in States other than Utah in favor of citizens of States other than Utah?

See:

Ehalt v. *McCarthy*, 104 Utah 110, 138 P. (2d) 639. Ehalt was a resident of Denver and was injured while working in Denver.

Bruner v. *McCarthy*, 105 Utah 399, 142 P. (2d) 649. Bruner was a resident of Grand Junction, Colorado, and was injured while working in Colorado.

Allison v. *McCarthy*, 106 Utah 278, 147 P. (2d) 870. Allison was a resident of Colorado and was injured while working near the Royal Gorge in Colorado.

Pauly v. *McCarthy*, 166 P. (2d) 501 (not yet reported in Utah Reports). Pauly was a resident of Grand Junction, Colorado, and was injured while on duty near Glenwood Springs, Colorado.

The foregoing are only a few of the many cases that counsel for this Petitioner have filed and are filing in the Utah courts under the Federal Employers' Liability Act against the various railroads, involving accidents to residents of foreign States, occurring in foreign States.

It is submitted that a reading of the four cases above cited will demonstrate a disposition on the part of the Supreme Court of Utah conscientiously to apply the Federal Employers' Liability Act according to the applicable decisions of the United States Supreme Court, having full regard to the broadening of the Act which has followed the decisions commencing with *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444.

On page 24 petitioner contends that the Supreme Court of Utah is "not in accord with the holding of this Court in the *Tiller* case—" in regard to assumption of risk. It is submitted that the Utah court in the *Pauly* case manifested complete sympathy with the decision in the *Tiller* case regarding assumption of risk and that its decision is in no way based upon assumption of risk. The court referred to assumption of risk as "a cruel doctrine" and stated that it was fortunate that it had been "forever abolished in the railroad industry." (R. 185.)

Statement of The Case

Respondents are constrained to make a statement of the case and to point out the omissions and misstatements in petitioner's brief because Petitioner misstates and omits important evidence and facts.

Pauly, an experienced railroad conductor, was injured when he backed off and dropped from a standing caboose (R. 92) in the night time without looking for safe footing (R. 133-135), in violation of Safety Rule No. 3 of the Company reading:

> "Before getting on or off equipment, employees must look out for safe footing—." (R. 7, 130, admitted in evidence R. 131.)

Pauly knew this rule and knew it was necessary to look for safe footing before stepping down. (R. 132.) There was no footing whatever because the south step of the caboose was almost flush with the south ends of the ties of the bridge. (R. 30.) He dropped off into space and fell 17 feet to the bottom of the creek. (R. 92.)

Pauly, if he had looked, could have seen that there was no footing and that he would drop into the creek bed. (R. 52, 53, 55, 74, 76, 88, 101, 102, 114.) He had in his hands when he dropped a lighted electric hand lantern (R. 91) and a lighted yellow fusee (R. 91), either of which, if he had looked, would have disclosed the situation and danger. (R. 52, 62, 157.)

Pauly thought about the danger of the bridge only a few seconds before he dropped (R. 108) and realized he was near it, but guessed that he was past the bridge by three or four car lengths, (R. 109) (150 to 200 feet) (R. 38), and acting upon that guess dropped off backwards without looking.

Pauly had no work to do on the bridge itself. (R. 88.) The train had been brought to a stop at Chacra because shortly before reaching there Pauly, his rear flagman Ventura, the Engineer Linkins and the head brakeman all knew that brakes were sticking, causing fire, on a truck of a car in the train. (R. 36, 69, 86.) Pauly thought that the car in question

was ten to fifteen car lengths (500-750 feet) ahead of the caboose. (R. 88.) It was Pauly's duty as soon as the train was stopped to dismount from the caboose and walk from 500 to 750 feet westerly to the car that was in trouble and eliminate the sticking brakes. (R. 88.) Pauly had no work to do at the bridge. On the contrary it was his duty, as he himself testified, to proceed forthwith to the car that was in trouble to fix it. (R. 88.)

The train had stopped on the main line which was the southerly of the two tracks. North of it was the passing track. The space between the two tracks was completely covered by a plank footwalk, 12 feet wide with 7 to 8 feet clearance when trains occupied both tracks. (R. 50.) Pauly could have dismounted on it and crossed over the bridge on it on his way to the car with the sticking brakes. Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217, admitted in evidence R. 29), Exhibit I (R. 223, admitted in evidence R. 28). Pauly stepped off on the other side, the south side where there was no footwalk. (R. 92.)

There was no train on the passing track when Pauly stepped down. Nor was there any train on the passing track while Ventura, after the accident, walked forward twenty to twenty-five carlengths, 1000 to 1250 feet, and then returned to the caboose. (R. 41, 46.)

Pauly could have proceeded safely along the north side (i. e. the side on which there was a bridge) of the train to fix the sticking brakes, as indeed Ventura actually did immediately after the accident. (R. 41, 46.)

Pauly could have discovered and fixed the sticking brakes from the north side (i. e. the side on which there was a bridge) as indeed Ventura actually did. (R. 46, 60.)

Chacra, where the accident happened, is merely a switch track siding. (R. 43, 44, 68, 69, 83, 84.)

Omissions and Misstatements of Facts in Petitioner's Statement of the Case

(1) *Petitioner stepped off the caboose without looking to see whether he had safe footing.*

Petitioner's brief, particularly on page 11, gives the impression that the petitioner looked effectively before dismounting from the caboose.

Pauly testified both in his deposition and on cross examination at the trial that he stepped off the caboose without looking. His deposition was taken on August 1, 1944, six months after the accident and less than two months before the trial. In it he testified over and over again that he did not look before he stepped down. The following answers from Pauly's deposition were admitted by him on cross examination to be true:

> Q. Did you look down there before you stepped?
>
> A. No, it was all black to me as if I was on the main line is all, on the side of the track. (R. 167.)

Pauly admitted this answer was true at R. 133, 134.

> Q. You didn't look before you stepped then?
>
> A. No, my idea was I was going to go down to the car and look at it as fast as I could while we were still stopped; I picked up the fusee, took my lantern, cracked the fusee and stepped right off. (R. 167.)

Pauly admitted this answer was true at R. 134.

> Q. Did you turn your lantern, the light of it, down below where you were going to step, before you stepped down?
>
> A. I had it lit; I didn't turn it downwardly; I would have the light in my hand; as I cracked the fusee I had it in my hand; I had this hand (indicating) on the hand rail of the caboose on this side; as I stepped down this hand would be here (indicating), the light would be here (indicating); as I stepped down you would figure you was on the ground ready to move. (R. 167).

Pauly admitted this answer was true at R. 134.

> Q. You didn't look down?
>
> A. No; you are standing on the end of the caboose like this (indicating), you crack the fusee, the lantern in your hand. (R. 167.)

Pauly admitted this answer was true at R. 134.

Q. You just stepped down?

A. I just stepped down. (R. 168.)

Pauly admitted this answer was true at R. 135.

Q. Without looking?

A. Yes, figuring that was the ground. (R. 168.)

Pauly admitted this answer was true at R. 135.

(2) *The record conclusively shows that petitioner would have seen the danger if he had looked.*

Pauly in his brief claims it was so dark that he couldn't see where he was stepping and attempted to justify his failure to see that he was stepping off into space by alleging in paragraph 6 of his complaint, "that owing to the weather conditions and the darkness of the night as aforesaid, it was impossible for plaintiff to discover or ascertain the facts with regard to the place where said caboose had been brought to a stop and plaintiff had no knowledge and did not know that the said caboose had been and was stopped upon said bridge." (R. 3.) There was no evidence to support this allegation. On the contrary the evidence affirmatively and without contradiction shows that Pauly could have seen if he had used his lantern or fusee and his eyesight which was good. (R. 101.) He testified that it was just commencing to snow and that it was not snowing enough to interfere with his vision. (R. 102.) He saw the fire flying from the sticking brake ten to fifteen cars (500-750 feet) ahead of the caboose. (R. 88.) He was able to check the engine number on Train No. 20 as it passed him. (R. 117.) He was able to see the mountains as he came down the track from Funston to Chacra. (R. 114.) Ventura, who dismounted only a few seconds before Pauly, was able to see where he was stepping and that it was safe. (R. 52.) The roadbed was slag but he was able to see it. (R. 52.) Ventura was using his lantern to illuminate his way as he walked back from the caboose to flag and was able to see his way all along there. (R. 53.) After the accident, when Ventura was in the creek bed some eighteen feet below the track, he was able to see the steps of the caboose. (R. 55.) Linkins

also was able to see the position of the caboose from the creek bed. (R. 74.) The head brakeman was able to see Pauly's red fusee a distance of eighty-six cars or substantially four thousand feet. (R. 76.) Moreover, Ventura was able to see the signal given by the head brakeman in response to the red fusee the same distance. (R. 55.)

A lantern just like Pauly's (R. 96) is in evidence as Exhibit 3 (Admitted in evidence at R. 154) and a standard yellow fusee was admitted in evidence at R. 158 to show the degree of light available to Pauly and will be made available by stipulation.

(3) *Petitioner was thoroughly familiar with the existence of the bridge between the tracks and thought about the danger of the south side of the bridge a very short time before dismounting.*

Petitioner's statement of the case would give the impression that at the time he dismounted he was oblivious of the fact that there was a bridge in his immediate vicinity.

Pauly, immediately before the accident, knew that he was in the close vicinity of this bridge but thought he had passed it by about three or four car lengths. (R. 108, 109.) Immediately after the accident he said, "I thought I was past the darned bridge." (R. 51.) He thought about the bridge when he was in the caboose a very short time before going to the front end and dismounting. (R. 112.)

Pauly had been crossing over this bridge for seven years, during which time he estimated: he had crossed the bridge 1000 times (R. 105); as many times in daylight as darkness (R. 106); had walked over the bridge between the tracks fifty times (R. 107); and in darkness had walked over the bridge between the tracks 10 times. (R. 108.) He had observed and knew that there was a foot walk between the tracks and that there was no foot walk or rails on the outside of the tracks. (R. 107.)

(4) *There was a wooden platform to the north of the main line track, on which petitioner's caboose stood, on which petitioner could have safely dismounted and crossed.*

Petitioner's statement of the case does not disclose this important fact. It is demonstrated in Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217 admitted in evidence R. 29) and in picture No. 10 of Exhibit I (R. 223, admitted in evidence R. 28.) The bridge is 11 feet 4 inches wide (R. 25) and is 92 feet 6 inches in length. (R. 25.) There is seven or eight feet clearance when both tracks are occupied by trains. (R. 50.) If petitioner had dismounted on this bridge by getting off on the north side of the caboose he would have been entirely safe and could have crossed the bridge on the way to his place of work.

(5) *The evidence without contradiction negatives Pauly's contention that he had to dismount on the south side because he saw fire from the south side; demonstrates that he could have made his examination for the sticking brake from the north side of the train; and establishes that he should have used the bridge on the north side of his caboose to dismount and cross the creek.*

Petitioner on page 11 states that the fire caused by the sticking brake was seen on the south side, and in accordance with established practice he alighted from that side to fulfill his duty of inspecting and repairing the brake. The contrary is true. The evidence shows without conflict that the identity of the sticking brake could be and actually was discovered from the north side of the train.

Ventura, testified that he actually found the sticking brake by looking for it on the north side of the train in spite of the fact that the fire had been seen flying from the south side (R. 46, 58, 59, 60); that they could tell from what they saw in the caboose that the fire was from a sticking brake (R. 47); that the fire was as bright as a yellow fusee (R. 48) and that it could be seen fifty cars away (R. 48); that when one brake sticks, all of them do (R. 49); that the truck on which there is a sticking brake can be detected from either side of the car. (R. 49.) On redirect examination counsel for plaintiff attempted to put words into the mouth of Ventura, who was his own witness, that there would be no smoke coming from the north side wheels. Ventura, however, testified positively that he discovered the sticking brakes from smoke

coming from wheels on the north side (the bridge side) of the train. (R. 60.) At R. 60 he testified:

> Q. The observation you made was with reference to smoke and odor, and that is all?
>
> A. Yes sir.
>
> Q. You don't know where it came from, do you?
>
> A. I know where the smoke come from, it was coming from the north side wheels.
>
> Q. How do you know?
>
> A. I seen them.

Ventura also testified without contradiction that no danger would be encountered in walking between the tracks to look for the sticking brake. (R. 50.) He also testified that if another train came by on the passing track he could step in between the cars of his train, thus having a safety zone every fifty feet. (R. 63.) He also testified that he knew his own train would not move. (R. 64.) This would be necessarily true because it was stopped by a red fusee from the rear and could not be moved until a signal was received from the rear end.

Pauly was the only other witness who testified on the subject and he also stated that when one brake is sticking all four are sticking because they are all controlled by the same brake cylinder, and that when one brake and wheel are hot and smoking, the others are also. (R. 148-150.)

(6) *The record establishes as matter of law that there was no passing train on the passing track when Pauly dismounted from the caboose.*

On page 11 and throughout the brief petitioner contends that one of the reasons he descended from the south side was because passenger train No. 20 was then passing on the north side. He pleaded it as his only excuse for getting off on the south side. (R. 3.)

This contention was completely rejected by the Supreme Court of Utah in the last paragraph commencing on R. 183

and ending on R. 184. It concluded that even giving Pauly the benefit of his "reconstructed testimony" Train No. 20 would have passed before Pauly stepped down. This is unquestionably so. Train No. 20 consisted only of an engine, baggage car, mail car, coach and sleeper—an engine and four cars. (R. 54.) It was going east and passed Ventura when he was walking back to flag. (R. 38.) Even if Pauly checked only the engine of No. 20 on the west end of the caboose, that short train would have passed him before he could light his fusee and dismount. But Pauly testified that he performed his duty of checking all the equipment in Train No. 20, as required by Rule 810. (R. 116, 117.) All of Train No. 20 would therefore necessarily have passed him before he even commenced to dismount. After that train passed no other train passed during the 40 to 45 minutes until the ambulance came and got Pauly. (R. 41.)

But Pauly definitely and positively testified that he was on the back platform of his caboose as Train No. 20 passed him; that while on the back platform he observed and checked the equipment in Train No. 20; and that after Train No. 20 had passed him and he had checked the equipment he went back into the caboose, put on his overcoat, went to the front platform with his lantern lighted, lighted the fusee and then stepped off the south side of the caboose step. His testimony is as follows:

> Q. At that time you were on the head end of the caboose, is that right?
>
> A. When I checked the train I was on the rear end.
>
> Q. When you checked the train you were on the rear end?
>
> A. That's right. When I said to the brakeman "I will go over and check that car while we are meeting another train." Evidently I knew they had our signal, they were going to stop there.
>
> Q. You were on the rear platform?
>
> A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat.

Q. That all happened after you checked the train?

A. That is, my going through the caboose to get my coat, yes.

Q. Putting on your overcoat?

A. Yes, I had no reason to have it on—still in the cupola; as I started to get down with it this train came through the passing track, so I stepped to the rear platform to check it and told my rear brakeman to take care of the hind end, "I will check this car now."

Q. When you say it was engine 802 did you then know it was train No. 20?

A. Yes.

Q. Why?

A. I checked the passenger equipment too; that is the usual passenger engine.

Q. Did you check the passenger equipment?

A. That's right.

Q. As it went by you?

A. Yes, that's right.

Q. When you were on the back platform?

A. Yes.

Q. What did the equipment consist of?

A. Baggage car, mail car, day coach and sleeper; four cars.

Q. Then after the train passed you going east you went back in the caboose and put on your overcoat and then went to the head end of the caboose, is that correct?

A. That is correct.

Q. Was there any other equipment in the passing track after train 20 passed you?

A. No, not right exactly then, no.

Q. Was there at any time that you saw?

A. No. (R. 163-164.)

At the trial petitioner's counsel, by shockingly suggestive questions, brought out that Pauly had "reconstructed" his evidence on this subject. (R. 138.)

However, Pauly on cross examination affirmed the truth of the evidence given on his deposition: that he checked train No. 20 from the rear end of the caboose (R. 123); that he checked the equipment of train No. 20 as it went by him (R. 126); that train No. 20 was checked by him to consist of four cars, baggage, mail, day coach and sleeper (R. 127); that after he checked train No. 20 from the back platform he went into the caboose and got his coat (R. 126); and that he saw no other equipment on the passing track at that time. (R. 128.)

(7) *There is no evidence that any Safety Rule required petitioner to dismount from the south side of the caboose.*

On page 11 petitioner asserts that Ventura and Pauly dismounted on the south side "in compliance with safety rules," reference being made to R. 38, 39. It will be found that Ventura merely testified as follows:

Q. The south side. Have you had, as brakeman, any instructions with reference to the side from which to dismount?

A. Yes sir, its the best to mount on which side is the safest.

Q. Which would be the safest side?

A. The left side.

Q. Why?

A. Because there was a train coming down the pass, might fall, and fall right into the wheels of the train.

Q. And so you dismounted, as you say, from the left side?

A. Yes sir.

Ventura made no mention of any Safety Rule.

On page eleven also it is stated that the petitioner prepared to alight from the train on the south side because the Safety Rules required it and reference is made to page 90 of the record. The only evidence by the petitioner on the subject of rules is as follows:

> Q. During the years that you have worked for the defendant here as brakeman and as conductor, have you ever had, or received any instructions with reference to the proper side of the train from which to alight under different circumstances?
>
> A. Well, safe course is the course to pursue; one of the rules of the company, always pursue the safe course.
>
> Q. Under that rule which would be the safe side to alight from, if the train were stopped on the main line track at Chacra?
>
> Q. At night.
>
> A. Left side of the train.

There is no other evidence on the subject.

(8) *There is no evidence that trains customarily stopped or were inspected or repaired at Chacra. The only evidence is that Chacra was a passing track where trains pass and where emergency work might be done.*

Plaintiff alleged that freight trains "were customarily and ordinarily stopped upon defendants' main line and passing tracks" and that it was "usual, customary and necessary for members of various train crews to pass along said trains" for the purpose of examining trains. (R. 4.)

Petitioner on pages 8 and 10 assumes that these allegations were proved.

The Supreme Court of Utah carefully scrutinized the record, was unable to find any such evidence and so declared. (R. 173-175, 178.) It summed up the evidence and record as

demonstrating, without conflict, that Chacra was nothing but a passing track.

Respondents fully discuss the evidence and record under II herein and will not repeat the discussion at this point.

I

The Supreme Court of Utah Properly Set Aside the Jury's Verdict and Dismissed the Petitioner's Case because the Verdict of the Jury was not supported by Substantial Evidence.

Herein of Petitioner's Point I.

This court has repeatedly and recently ruled that under the F. E. L. A. there must be evidence of negligence on the part of the defendants and such negligence must be a proximate cause of the accident and injury.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232. Decided Dec. 20, 1943. The decedent was killed by a car on which he was riding running over a derail switch. There was a failure of evidence as to what person set the derail which caused the accident, whether Brady or some other person. The court held that a verdict was properly directed for the defendant. On pages 479 and 480 the court said:

> * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409. Jan. 17, 1944. On page 32 the court said:

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove

that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 451, 143 A. L. R. 967.

Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444. On page 67 the court said:

> They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the accident.

II

The Supreme Court of Utah properly held that there was no Evidence of Negligence by the Railroad in failing to exercise reasonable care in furnishing Petitioner with a safe place of work.

Herein of Petitioner's Point II.

The only allegation by petitioner that defendants failed to exercise due care to furnish him a safe place to work is in subparagraph B of paragraph 9. (R. 4.) It charges that the Railroad failed "to build, construct and maintain a walk with handrails on the side of the bridge" and failed to provide any lights or markers to indicate the presence or dimensions of said bridge and failed by any means to protect employees against the dangers of the bridge. (R. 4.)

Petitioner sought to force his case into the frame work of *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062. But in that case the decedent was required to do work while standing on the bridge from which he fell. Pauly, on the other hand, had no work to do while on the bridge. On the contrary his immediate duty was to proceed westerly ten to fifteen car lengths (500 to 750 feet), there to eliminate sticking brakes. Moreover, there was a perfectly safe way for Pauly to get to his place of work. He could dismount on the north side of his caboose on the platform for that purpose and proceed safely to his place of work.

Inasmuch as Pauly had no work to do on the south side of the bridge where he dismounted, he was reduced to the necessity of claiming that every place in Chacra, including the place from which he fell, was such that there must be a safe walk-way, so that he would be caught when he dismounted without looking. Petitioner makes that contention on page 17 and claims that the evidence of Ventura, Linkins and Pauly supports it. (See page 15.) He contends that all three of them testified that "this territory was a place of work." No reference to the record for such extraordinary evidence is given. None such was given. It would have been objectionable as a conclusion of law.

All of Ventura's evidence on this subject will be found at R. 43, 44; Linkins' at R. 68, 69; and Pauly's at R. 88, 89.

That evidence was carefully considered and analyzed by the Supreme Court of Utah at R. 174, 175, 177 and it is submitted that it is correctly summarized at R. 177 and 178 as follows:

> The engineer, Linkins, did not so testify. The inference from all the other testimony as to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line.

The bridge at Chacra might have become a place of work under certain circumstances. Suppose for example a car had to be dumped, as in the Bailey case, and the employee had to stand on the south side of the bridge to manipulate the dumping mechanism, it would have become a place of work. Or suppose the fire on the trouble car was caused by a *hot box* on the south side (as Justice Turner erroneously assumed in the case at bar, R. 195) and that car stopped on the bridge so that to fix the hot box Pauly had to work while on the ties

or stringer on the south side of the Chacra bridge, it might well be as to him under those facts a place of work.

But merely because a certain spot on a railroad is a place of work under certain facts and circumstances, it does not follow that it is such under all facts and circumstances. Thus in the *Bailey* case, suppose there was no car on the bridge and the decedent, instead of standing on the edge of the bridge to manipulate the dumping mechanism was merely crossing from one side of that bridge to the other to get to the place where he was to work and, instead of using a perfectly safe platform walk between the rails was walking along that same stringer and fell therefrom. Obviously that stringer would not be a place of work as to him under those circumstances.

It is uncontradicted that Pauly's only purpose was to proceed to the car with the sticking brakes and cut out the air brakes on that car. This could have become necessary any place on the railroad. It did not pertain particularly to a passing track. This train went as far as the side track at Chacra only because it was near at hand. (R. 70, 86.) Otherwise it would have been stopped on the main line between stations. Pauly had no work to do on the bridge. (R. 88.) He would use the bridge only to cross the creek to the car with sticking brakes. To do this he had a perfectly safe walk way between the main line and passing tracks.

If the railroad was required to regard this bridge as a place of work which it must keep safe so that conductors could back off cabooses without looking, it would follow that every foot of ground, not only in the Chacra siding but over the entire railroad, would have to be kept in like condition. A brake may stick any place on the railroad. If it sticks and is sufficiently dangerous, the train must be stopped out on the main line where there is no siding at all. It might be stopped on trestles, mountain sides, etc. (R. 133.) It merely happened that this sticking brake was seen at a time when the train was close to the Chacra siding and under such circumstances that the trainmen concluded they could safely go on to that siding.

No authority supports petitioner's contention. He relies primarily on *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S.

350, 87 L. Ed. 1030, 63 S. Ct. 1062. The difference between the two cases is pointed out above.

A recent case which distinguishes the *Bailey* case on facts much like those in the case at bar is *Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 557 (N. H. Sept. 1943). Kenney was killed while serving as head brakeman of a freight train, when he stepped into space from the side ladder of a box car which had been stopped on a bridge which had no walk or guard rail. The deceased gave the signal to stop. After the stop the engineer saw the deceased with his lighted lantern climb down the side of the car and fall into the creek below.

The plaintiff contended that the Railroad was negligent in not providing the bridge, as a work place, with a cat walk and a rail. The Supreme Court of New Hampshire held as matter of law that there was no duty on the part of the railroad to anticipate that Kenney would use the bridge as a work place. The court said on page 560:

> Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe as a work-place being anticipation (cf. D'Ambrosio v. Boston & M. R. R., 81 N. H. 119, 124 A. 551) no duty in that respect can be found. The bridge was not a workplace in the sense that might perhaps have been found if the shifting operations were likely to result in a car standing on the bridge.

Although the Supreme Court of Utah was unwilling to regard *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, as a controlling authority (see pages 178, 179), nevertheless the holding of this court in that case as follows:

> "If negligence caused the injury, it was exclusively that of respondent" (the brakeman and plaintiff)

negatives petitioner's contention that failure to have a wa
or other device to catch trainmen who dismount without loo
ing is a failure to furnish a safe place of work. It was so r
garded in the *Kenney* case.

In addition to the *Bailey* case, Petitioner relies on *Ca*
man v. *Pennsylvania-Reading Seashore Lines*, 110 Fed. (2
832, (3rd C. C. A.), *Bly* v. *Southern Railway*, 183 Va. 16
31 S. E. (2d) 564, rehearing denied, 183 Va. 406, 32 S.
(2d) 659; *Bimberg* v. *Northern Pacific Railway Compan*
217 Minn. 187, 14 N. W. (2d) 410, (certiorari denied, 323
S. 752, 89 L. Ed. 602, 65 S. Ct. 87; *Rashaw* v. *Central Vermo*
Railway, Inc., 133 F. (2d) 253 (2 C. C. A. 1943); *Murphy*
Boston and Maine Railroad, —— Mass. ——, 65 N. E. (2
923.

The *Cawman* case was regarded, correctly it is submitte
by the Supreme Court of New Hampshire in the *Kenney* ca
and by the Supreme Court of Utah in the *Pauley* case (see
181) as without authority because it is impossible to unde
stand either basic facts or the charge of negligence.

The *Bly* case is readily distinguishable because Bly ha
to dismount from the caboose for the purpose of back flaggin
the caboose steps extended out beyond the edge of the trest
on both sides; Bly, encumbered with his signaling imped
menta, had to swing around the end of the caboose platfor
from the steps in order to get on to the bridge. He fell dow
under the steps of the caboose where it had stopped and wa
killed. The court indulged the presumption of due care appli
able in death cases and not applicable in such cases as Pauly'
where Pauly took the witness stand and testified that he di
not use any care whatever. He could have descended betwee
the tracks on a perfectly safe bridge.

The *Bimberg* case is within the doctrine of the *Baile*
case. The decedent under direction from his superior wa
working on the bridge, using a lining bar to straighten th
railroad track. He could not be elsewhere.

In the *Rashaw* case it was necessary for the decease
brakeman to cross the bridge as he did cross and the bridg
was not in standard condition, that is, it was under repair an
was covered with ice.

In *Murphy* v. *Boston and Maine R. Co.*, the court concluded that decedent fell from a sea wall along which he had to pass to reach his engine, unprotected by a guard rail. This case is like the *Rashaw, Bly* and *Bimberg* cases as distinguished from the *Kenney* and *Berry* cases and the case at bar.

There is no evidence that the absence of lights or markers on the bridge constituted negligence.

The allegation regarding lack of lights comes to nothing because there is no evidence that the Denver and Rio Grande Western or any other railroad in the United States has ever placed or maintained lights or markers in such position.

Ventura and Linkins testified on direct examination that there were no lights on the bridge. On cross-examination Ventura testified that there never are any lights on bridges or along passing tracks; that it is always left to trainmen to see conditions by their lanterns; and that railroads furnish electric lanterns, batteries and light globes for their use. (R. 44.) Linkins also on cross-examination testified that railroads never have lights on bridges to illuminate the bridges. (R. 73.) There is no evidence to the contrary of that of Ventura and Linkins.

Petitioner makes no contention that there is any evidence in the record that it was customary for the Railroad to equip bridges situated like the Chacra bridge with foot walks and handrails.

Therefore, respondents will refrain from discussing the record on that subject.

III

The Supreme Court of Utah correctly held that there was no evidence that the Railroad should, in the exercise of reasonable care, have anticipated that an experienced Conductor would back off a Caboose without looking and provide facilities to catch him.

Herein of Petitioner's Point III.

Petitioner expresses consternation at such a holding. It is elementary in the law of torts. This court recently reiterated the doctrine.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.

The court held that it was not reasonably to have been anticipated that the condition of the derailer and worn rail would cause the accident. On page 483 the court said:

> * * * Bare possibility is not sufficient. Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, at page 475, 24 L. Ed. 256; "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Events too remote to require reasonable provision need not be anticipated.

On page 484 the court said:

> The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

This court in the *Brady* case also pointed out that a railroad is not obligated to furnish an absolutely safe place of work but only one that is reasonably safe.

It held that although it was a bare possibility that striking a derailer from an unexpected direction would cause an accident that it was so unusual that provision to guard against it was beyond the requirements of due care. On page 483 the court said:

> The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view

that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient.

An accident and injury are always possible. Merely because an accident occurs and an injury is suffered is no evidence of negligence.

Throughout his brief petitioner argues that if the bridge at Chacra had had guard rails or a walkway or lights on the south side the petitioner would not have been injured. This is the typical "hind sight" argument which runs all through petitioner's brief—the defendant was negligent because the place of work must have been dangerous because petitioner fell and if the place had not been dangerous petitioner would not have fallen. It reasons in a circle and begs the question. Moreover, it is pure speculation to assert that Pauly would not have been injured if there had been a walk and rail. It would depend on how wide the walk might be, the position of the rail, and how he stepped and landed. It is within the realm of reasonable speculation that he might have received just as bad injuries as in fact he did.

Petitioner's contention comes to this, that the railroad should anticipate that an experienced conductor, with seventeen years experience as a railroad trainman, knowing of the rule that he must look for a safe place to alight before stepping off trains, would in violation of that rule, and with ample facilities to see, knowing that he was near and might be on the bridge, back off the train without looking, and that the railroad should have either a walk with a rail to catch him or hang life nets over the edge of the right of way if nothing else would be feasible.

On page 11 petitioner makes the argument that the south side was the safe and proper side from which to alight. His own evidence proves that that was not his judgment. He thought about the bridge and thought he had passed it. (R.

108, 109.) After the accident he exclaimed that he thought he was past the "darned bridge." (R. 51.) Except for his mistake or inadvertence, the inference is clear that he wouldn't have stepped down on the south side but would have stepped down on the platform to the north.

Pauly's complaint recognizes that he would not have dismounted on the south side but would have used the safe passage way over the creek on the north side of his train except that he alleged that train No. 20 was passing. His only allegation explaining why he chose to step off on the south side is that Train No. 20 was passing and therefore it was dangerous to get off on the north side. (R. 3.) As the record demonstrates Train No. 20 had passed when he dismounted.

IV

The Supreme Court of Utah correctly held that a verdict should have been directed because the sole proximate cause of the accident was Pauly's own negligence.

Herein of Petitioner's Point IV.

If negligence of respondents was not a proximate cause and if the sole proximate cause of the accident was petitioner's own negligence, there can be no recovery under the F. E. L. A.

This Court in the *Brady* case said on page 484:

> The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

Kenney v. *Boston & Maine R. R.*, 33 Atl. (2d) 557 (N. H. Sept. 1943). The facts are stated under the previous heading. On Page 561 the court said:

> * * * If he had known where he was and had stepped off as he did, his negligence would have been the sole proximate cause of his injuries and death.

So also in *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, the court on page 512 said:

> * * * If negligence caused the injury it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-59).

The test laid down by the *Brady* case is whether the alleged negligence of the railroad in not having a footwalk and handrail on the south side of the bridge, in addition to the platform on the north side, is a link in an unbroken chain of reasonably foreseeable events. If the chain of events was not reasonably foreseeable by the railroad, its failure to have a footwalk and handrail is not the proximate cause of the accident.

Under III it is argued and submitted that it was not reasonably to be anticipated or foreseen that Pauly would behave as he did. If so, then the undoubted negligence of Pauly in violating rules of the company and stepping off the caboose without looking was the sole proximate cause of the accident.

Is it reasonable to require the railroad to anticipate that Pauly would violate its rules? Is it not reasonable for the railroad to anticipate that Pauly would comply with its rules? If Pauly had complied with either of two rules this accident would not have occurred. If he had descended from the rear end of the caboose as required by Safety Rule 3 (R. 7, 130, admitted in evidence R. 131) he would not have been injured. If he had looked out for a safe footing before stepping down from the caboose, as required by Safety Rule 3, he would not have been injured.

In the *Kenney* case it is said that if Kenney had known where he was and stepped off as he did, that his negligence would have been the sole proximate cause of the accident. No one would contend the contrary. But Pauly knew where he was. He knew that he was in the near vicinity of this bridge. He thought about the bridge and the danger of it when he was in the caboose just before he went to the front platform and stepped off. To be sure, he thought he was three or four car

lengths past the bridge. Of course, he could not be certain of that and knew that he could not be certain of it. Nevertheless he backed off the caboose without looking. It is submitted that Pauly's negligence was the equivalent in legal effect of stepping off the caboose in spite of the fact that he knew where he was, and that his behavior is within the doctrine of the *Kenney* case.

For those reasons Pauly's violation of the safety rules was the sole proximate cause of the accident.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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